Supreme Court, U.S.
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No. 94-2133

In the Supreme Court of the United States

OCTOBER TERM, 1995

SHERYL CRAWFORD, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supported the administrative finding that a horse owned by petitioner was "sore" at the time of its entry into a horse show, in violation of the Horse Protection Act, 15 U.S.C. 1821 *et seq.*

2. Whether substantial evidence supported the administrative finding that petitioner "allowed" the entry of a "sore" horse in violation of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 130a-143a) is reported at 50 F.3d 46. The final decision of the United States Department of Agriculture (USDA) Judicial Officer (Pet. App. 53a-129a) is not yet reported. The revised decision of the Administrative Law Judge (Pet. App. 25a-52a) is not yet reported. The initial decisions of the USDA (Pet. App. 21a-24a) and the ALJ (Pet. App. 1a-20a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1995. The petition for a writ of certiorari was filed on June 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Tennessee Walking horses are prized at horse shows for their distinctive, high-stepping gait, a "walk" typically achieved through a combination of careful training and the horse's natural breeding. Competitive industry pressures, however, have led some horse owners to inflict injuries on the forelimbs of such horses that induce the horses to adopt such a gait. Specifically, when a horse's front feet are deliberately made sore, either through the application of chemicals or by making cuts, burns, or lacerations, "the intense pain which the animal suffer[s] when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking horse. H.R. Rep. No. 1597, 91st Cong., 2d Sess. 2 (1970); see also Pet. App. 131a.

In 1970, Congress enacted the Horse Protection Act (HPA), 15 U.S.C. 1821-1835 (*reprinted in part* at Pet. App. 144a-161a), to end the practice of "soring" horses. Congress had two reasons for prohibiting that practice. First, soring inflicts great pain on the horse. Second, owners and trainers who sore their horses gain an unfair competitive advantage over those who rely on skill and patience. H.R. Rep. No. 1174, 94th Cong., 2d Sess. (1976). See *Elliott* v. *Administrator, Animal Plant and Health Inspection Serv.*, 990 F.2d 140, 144-145 (4th Cir.), cert.

denied, 114 S. Ct. 191 (1993); *Thornton* v. *United States Dep't of Agriculture*, 715 F.2d 1508, 1511-1512 (4th Cir. 1983).

The HPA prohibits a number of practices with respect to "any horse which is sore." 15 U.S.C. 1824(2). These include "showing or exhibiting" any such horse, 15 U.S.C. 1824(2)(A); "entering for the purpose of showing or exhibiting in any horse show or horse exhibition" any such horse, 15 U.S.C. 1824-(2)(B); and "allowing" any such entry, showing, or exhibition, 15 U.S.C. 1824(2)(D). The Act states that a horse is "sore" where

> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,
>
> and, as a result * * * such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting or otherwise moving * * * .

15 U.S.C. 1821(3).

In 1976, Congress amended the Act to make clear that, to establish a violation of the Act, the government need not prove that the owner (or trainer) intended to make a horse sore. 15 U.S.C. 1821(3). By thus ensuring that the inquiry under the Act focuses on the entry of a sore horse in competition and not on the intent of the horse's owner, Congress sought to "make it impossible for persons to show sored horses." H.R. Rep. No. 1597, *supra*, at 3. The 1976 amendments to the Act also provide that a horse that "manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs" is presumed to be sore. 15 U.S.C. 1825(d)(5). See *Elliott*, 990 F.2d at 144-145; *Thornton*, 715 F.2d at 1511.

The Act provides for both civil and criminal penalties for persons who engage in prohibited acts with regard to a horse which is sore. 15 U.S.C. 1825. A civil violation, as in this case, is punishable by a penalty of not more than $2,000. 15 U.S.C. 1825(b)(1). In addition, a violator may, after notice and a hearing, be disqualified from showing or exhibiting any horse for a period of not less than one year for the first violation and not less than five years for any subsequent violation. 15 U.S.C. 1825(c).

To ensure effective enforcement of the Act, USDA regulations require that each horse be inspected by a representative of the USDA Veterinary Services before it enters any horse show or exhibition. 9 C.F.R. 11.4. "Inspection" means the examination of a horse "by use of whatever means are deemed appropriate and necessary for the purposes of determining compliance with the Act and regulations." 9 C.F.R. 11.1. The examination may include visual examination; physical examination, including touching,

rubbing, palpating and observation of vital signs; and the use of diagnostic devices or instruments. *Ibid.*

2. a. Petitioner owns and shows "Supreme Image," a Tennessee Walking horse, which she entered in a show in Belfast, Tennessee in August 1986. Pet. App. 131a-132a. The horse was trained by Cecil Jordan, whom petitioner testified she had specifically instructed not to sore the horse. Petitioner paid the entry fee and intended to ride Supreme Image in the show. *Id.* at 132a-133a. Upon Jordan's presentation of Supreme Image to a show representative (the Designated Qualified Person (DQP)) before the show, however, the horse was rejected for competition.[1] Two USDA veterinarians responsible for monitoring compliance with the Act then examined Supreme Image and determined that the horse was sore within the Act's definition. The veterinarians recorded their observations. *Id.* at 133a. Their examination consisted, first, of observing the horse's reaction to their digital palpation of its front pasterns (*id.* at 75a), and second, of their observation of the horse's "way of going." *Id.* at 84a. The veterinarians found Supreme Image's way of going only as "fair," because the horse was reluctant to be led, and did not lead with a loose rein and walk normally. *Ibid.*

b. In September 1990, USDA instituted a disciplinary proceeding against petitioner for "allowing" the entry of a sored horse, in violation of 15 U.S.C.

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[1] The DQP is typically employed by the horse show to inspect horses and determine if they are sore and thus to protect the show management from liability under the Act. Pet. App. 133a n.3.

1824(2)(D).[2] Following a hearing, the ALJ found USDA's proof insufficient and dismissed the complaint. The ALJ noted that the two USDA veterinarians no longer recalled their examinations of Supreme Image four years earlier, and found the veterinarians' reports of those examinations to be unreliable hearsay. Pet. App. 10a-19a. The USDA's Judicial Officer, however, vacated the decision dismissing the complaint, and remanded to the ALJ. The Judicial Officer noted that the Administrative Procedure Act authorizes the use of evidence of a witness's "past recollection recorded" as reliable, probative, and substantial, 5 U.S.C. 556(d), provided that such recordings were made while the events recorded were fresh in the witness's mind. Pet. App. 21a-22a. Because the veterinarians had filled out their reports on Supreme Image's condition while their examinations were still fresh in their minds, the Judicial Officer held, the ALJ had erred in rejecting those reports as unreliable. *Id.* at 23a-24a.

On remand, the ALJ determined that petitioner had allowed the entry of a sore horse, in violation of 15 U.S.C. 1824(2)(D), assessed a $2,000 civil penalty on petitioner, and disqualified petitioner from showing or exhibiting horses for one year. Pet. App. 25a-52a. The Judicial Officer adopted the ALJ's decision and

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[2] The trainer, Jordan, agreed to entry of a consent decision and order regarding this horse, and was disqualified from show-related activities for 18 months. See *In re Cecil Jordan*, HPA Docket No. 91-23 (Apr. 17, 1991).

order as the Department of Agriculture's final decision and order. *Id.* at 53a-129a.[3]

c. The court of appeals denied petitioner's petition for review. It found that the Department's decision and order were supported by substantial competent evidence, on both the question whether the horse was sore and whether petitioner had "allowed" the entry of a sore horse within the meaning of the Act. Pet. App. 135a-143a.

ARGUMENT

Petitioner claims that the court of appeals erred both in upholding the finding below that Supreme Image was sore (Pet. 6-12) and in holding that petitioner had "allowed" the entry of a sore horse in a horse show in violation of 15 U.S.C. 1824(2)(D) (Pet. 13-18). The court of appeals' rulings on both issues were correct, and they do not conflict with any other decision. Review is therefore not warranted.

1. Petitioner argues first (Pet. 6-12) that the finding that Supreme Image was sore when entered in the show was not supported by substantial evidence. In making that argument, petitioner argues both that USDA improperly relied on the two veterinarians' reports regarding their examinations of the horse, and that USDA erred in basing its decision solely on the results of digital palpation of the horse. Both arguments lack merit.

a. As the court of appeals noted (Pet. App. 135a), administrative agencies may rely on hearsay evidence such as the written reports of experts, provided that

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[3] The Secretary has delegated to the Judicial Officer authority to render the Department's final decisions in these matters. 7 C.F.R. 2.35.

such evidence bears satisfactory indicia of reliability. See *Richardson* v. *Perales*, 402 U.S. 389, 405-406 (1971). The reports in this case satisfied that standard. As the court of appeals noted (Pet. App. 137a), it is undisputed that the two veterinarians examined Supreme Image after the show's DQP had rejected the horse based on soreness he detected in the horse's legs. After examining the horse, the veterinarians memorialized their findings in writing. That practice is sensible, if not necessary, given that USDA veterinarians examine numerous horses every year[4] and cannot be expected to recall the details of any particular examination after the passage of many months. See *id.* at 135a-136a.[5]

Moreover, it was undisputed that the veterinarians' reports were executed soon after the examinations. The summary of alleged violations, admitted without objection by petitioner (Tr. 41; C.A. Supp. App. 5), was prepared the same night as the examinations (Pet. App. 60a); one of the veterinarians' affidavits was executed just three days after the show and was probably written the morning of the show (*id.* at 61a); and the affidavit of the other veterinarian was signed two weeks after the show, but was based on notes made "while the events were fresh in the minds of the

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[4] Of the two veterinarians in this case, one had inspected 1,000 horses during a 14-year period, and the other had inspected between 6,300 and 9,600 horses during a 12-year period. Pet. App. 80a.

[5] Given the likelihood that the veterinarians would have proven unable to recall the results of their examination of Supreme Image even several months after that examination, the court of appeals concluded that petitioner had not been prejudiced by the fact that USDA did not file its proceeding against her for four years. Pet. App. 136a.

veterinarians." *Id.* at 23a, 60a-62a; Tr. 54, 69; 2 C.A. App. 21, 24. Indeed, the USDA Judicial Officer found that the documentation supporting the charges was prepared either while events were fresh in the veterinarians' minds, or from notes made while events were fresh in a veterinarian's mind. Pet. App. 23a, 86a-88a. Given that no evidence presented by petitioner contradicted the reports (*id.* at 136a-137a), the court of appeals was correct to find that it was "impossible to conclude that the Department's ruling is not supported by substantial evidence on the whole record" (*id.* at 137a).[6]

Relying on cases governed by Federal Rule of Evidence 803, petitioner also argues (Pet. 9-10) that the reports should be discounted because they were prepared in anticipation of these administrative proceedings. However, as petitioner concedes (Pet. 10), the Federal Rules of Evidence do not apply in administrative proceedings. *Richardson*, 402 U.S. at 407-408; *Calhoun* v. *Bailar*, 626 F.2d 145, 150 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981). Moreover, petitioner had the opportunity to cross-examine the two USDA veterinarians and to probe whether the prospect of administrative proceedings had any tendency to affect the manner in which they reported their findings and opinions. Petitioner also could have attempted to show that the prospect of administrative proceedings generally skews the reports of USDA veterinarians, rendering those reports unreliable. Petitioner, however, made no such showing; nor has she supplied any non-speculative basis for

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[6] The court (Pet. App. 136a) found the "minor inaccuracies" which petitioner now assails in the reports (see Pet. 10-11) to be of insufficient significance to undermine the reports.

doubting the reliability of the veterinarians' reports. Finally, petitioner's argument would effectively bar use of such reports in administrative proceedings altogether. That result—which would be contrary to this Court's decision in *Richardson* v. *Perales*, *supra*—is not mandated by any law or applicable rule of evidence, and would seriously undermine enforcement of the HPA.

b. Petitioner also contends (Pet. 11-12) that it is inherently unreliable to find a horse to be sore based solely on the results of digital palpation—*i.e.*, the fact that a horse has exhibited pain in response to manual probing of its forelegs. This case, however, does not present that issue, because the veterinarians' finding of soreness was based not only on the results of palpation, but also on the veterinarians' appraisal of the horse's "way of going" as only "fair," meaning that the horse was reluctant to be led, and did not lead with a loose rein and walk normally. Pet. App. 84a.[7]

2. Petitioner also argues (Pet. 13) that the fact that she allegedly instructed her trainer not to sore her horse precludes civil action against her for having "allowed" the entry in a show of a sore horse. But petitioner did more here than merely not prevent the entry of a sore horse; petitioner paid Supreme Image's entry fee herself and was going to ride the horse. Pet. App. 132a-133a. Petitioner relies on two

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[7] For this reason, the fact that Congress in 1992 restricted the use of federal funds to pay the salaries of veterinarians who rely solely on digital palpation (see Pet. 11-12; Pet. App. 137a-138a) is irrelevant. In any event, that legislation was enacted after the examination of Supreme Image, and, as the court of appeals held (*id.* at 138a), cannot apply retroactively to proceedings based on that examination.

cases in which courts held that owners who instructed their trainers not to "sore" a horse could not be held liable for the entry of that horse absent proof of knowledge of the horse's soreness. But in neither of those cases was the owner both on the scene and prepared herself to ride the sore horse. See *Burton* v. *United States Dep't of Agriculture*, 683 F.2d 280, 281-282 (8th Cir. 1982) (owner not even present at one show, and did not ride at either show); *Baird* v. *United States Dep't of Agriculture*, 39 F.3d 131 (6th Cir. 1994) (no indication that owner was present at shows or that he rode either horse).[8] Indeed, petitioner herself acknowledges that *Burton* and *Baird* are limited to the situation in which the horse owner

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[8] *Burton* and *Baird* are distinguishable from this case in other respects as well. *Burton* set out a three-prong test for owners to satisfy in order to defeat an allegation of "allowing" a sore horse. Petitioner fails to meet the first two parts of that test, because there is neither (1) a finding that she lacked knowledge that the horse was sored, or (2) a finding that a DQP had examined and approved the horse before entering the ring. Petitioner meets only the third part of the test: the existence of her uncontradicted testimony that she directed the trainer not to sore the horse. See *Burton*, 683 F.2d at 283. In *Baird*, the court found that Baird had "actually attempted to prevent, rather than allow, the exhibition or entry of his horses while they were sore." 39 F.2d at 132. That finding was based on Baird's testimony that he would take horses away from trainers he suspected of contravening his directive not to sore horses, and that both trainers involved understood his opposition to soring. *Id.* at 138. In this case, by contrast, there has been no such finding of an attempt by petitioner to prevent soring; instead, the record consists simply of petitioner's uncorroborated claim that she had "instructed her employee who trained 'Supreme Image' not to allow any harm, including soring, to her horse." Pet. App. 64a.

has undertaken no "affirmative act" to facilitate the horse's entry. Pet. 17.

The two other cases on which petitioner relies did not squarely address the issue of when an owner who has directed a trainer not to sore a horse can be liable for "allowing" the horse's entry into a show. See *Thornton* v. *United States Dep't of Agriculture*, 715 F.2d 1508, 1512 n.5 (11th Cir. 1983) (where facts showed merely that owner did not give trainer "a positive direction to sore," court declines to resolve issue, while stating that it is "inclined to agree with *Burton*"); *Stamper* v. *Secretary of Agriculture*, 722 F.2d 1483, 1489 (9th Cir. 1984) (court declines to decide issue because record disclosed no directive by owner not to sore horses). Petitioner's claim (Pet. 17) that her position is supported by a "general consensus among the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits" therefore is not correct.[9]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioner cites no decision of the Fifth Circuit on the issue of owner liability for "allowing" the entry of a sore horse.